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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 604

WINSTON CHURCHILL HENRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Summary statement	2
Questions presented	8
Reasons relied on for allowance of the writ	9
1. The decision of the Court of Appeals is in conflict with the decision of this court in Upshaw v. United States, 335 U.S. 410, on a question of paramount importance in the administration of criminal justice	9
2. The decision of the Court of Appeals is in conflict with the decision of this court in Quercia v. United States, 289 U.S. 466, on a question of paramount importance in the administration of criminal justice	9

Table of Authorities Cited

Cases	Pages
Quercia v. United States, 289 U.S. 466	9, 10
Upshaw v. United States, 335 U.S. 410	9

Statutes

26 U.S.C., sec. 2553 (a)	2
26 U.S.C., sec. 2593 (a)	2
28 U.S.C., sec. 1254 (1)	2

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To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Winston Churchill Henry, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its final judgment, entered January 15, 1951, affirming the

judgment of the United States District Court for the District of Hawaii. R. 546-547. A petition for rehearing was denied February 14, 1951. R. 547.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Court of Appeals is contained in the record. R. 540-546. It is not yet reported.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, 28 U.S.C., sec. 1254 (1).

SUMMARY STATEMENT.

Petitioner was indicted on two counts and found guilty of violating the narcotic laws of the United States, 26 U.S.C., sec. 2553 (a), 26 U.S.C., sec. 2593 (a). R. 2-3, 26-27. The judgment and commitment of the District Court sentenced him to imprisonment for 4 years and fined him $1000 on the first count, and 2 years and $1000 on the second count, sentences to run *consecutively*. R. 32-34.

The arrest of petitioner on July 16, 1949, was preceded by a search warrant issued July 12, 1949, authorizing narcotic agent Wells to search a building in the rear of 803 Hausten Street, Honolulu. R. 66-67.

The tenant of this building, according to the official Rent Control records of Honolulu, was one Helen Thomas. R. 431-435.

From 8:30 a.m. to 12:38 p.m. of July 16, 1949, narcotic agent Wells and 4 police officers kept the premises under surveillance. R. 258, 273, 370. During that period they saw two children, one a daughter and the other a sister of Helen Thomas, going in and out of the building to be searched; they saw one Montgomery drive up in an automobile, park it, and go into the building; and at 12:38 p.m. they saw petitioner walking from the premises toward the parked automobile. R. 259-261, 330, 355, 371. The search warrant was then served on petitioner, and one of the children admitted Wells and the 4 officers to the building. R. 370-371. Helen Thomas, the two children, and Montgomery were inside. R. 275-277, 371. During the greater part of the search that ensued Helen Thomas and the two children remained seated on a couch or sofa in the living room. R. 262-263, 274-276, 356, 371. Six additional police officers joined the searching party and participated in the search which began shortly after 12:38 p.m. and ended at approximately 3 p.m. R. 270.

Pursuant to the search warrant there was seized: (a) At 12:55 p.m. a bottle containing 915 capsules with white powder, R. 263-264, 267, 270; (b) around 1:08 p.m. a bottle containing a substance having the appearance of Epsom salts, R. 298-299, 309-310, 313; (c) after 1:09 p.m. a box containing 29 cigarettes, and a paper bag containing a substance having the appearance of tea, R. 321-323; (d) 6 cigarettes rolled up

in paper under a cushion of the couch or sofa on which Helen Thomas had been sitting, R. 327, 331-335, 339-341, 355-357. A police officer took finger prints from some of these articles. R. 315-316, 324.

Evidence in the record as to the character of the articles seized is confined to the testimony of a government chemist as follows: (a) Analysis of a "certain quantity" from some of 10 capsules taken at random from the bottle containing 915 capsules showed that the quantity thus analyzed was heroin, a derivative of opium, R. 393-394, 425; (b) analysis of a "certain quantity" taken from the bottle containing a substance having the appearance of Epsom salts showed that the quantity thus analyzed was cocaine, a derivative of cocoa leaves, R. 394-395, 425; (c) analysis of 3 of the 29 cigarettes showed that the cigarettes thus analyzed contained marihuana, and analysis of 29.6 grains taken from the paper bag showed that the substance thus analyzed was marihuana, R. 395; (d) analysis of 3 of the 6 cigarettes rolled up in paper showed that the 3 cigarettes thus analyzed contained marihuana, R. 398-399.

Narcotic agent Wells placed petitioner under arrest around 1 p.m. of July 16, 1949. R. 384. Wherever Wells went on the premises, petitioner "was obliged to go along with Mr. Wells". R. 329. He was kept on the premises until after 3 p.m. R. 270. He was subjected to interrogation during all that time. He was taken from the premises directly to the police station and interrogation still persisted around 5 p.m. R. 367, 412. The record is silent as to when he was first taken

before a Commissioner, but a fair inference from the record is that he was taken there the next morning.

Confessions and incriminatory statements allegedly made by petitioner after his arrest and during detention and which were used against him at the trial appear in the record as follows, R. 542-543:

> "Wells tasted the contents of the bottle and Henry stated, 'Man don't do that! Billy, that's dynamite.'
>
> "Wells said to the appellant, 'This bottle must contain about 200 grains.' The appellant replied, 'No, more than that.'
>
> "After the arrest the appellant told Helen Thomas to produce the key to the locked closet, which she did.
>
> "After the arrest Wells asked the appellant how long he had lived there and Henry replied, 'Oh, not very long.'
>
> "Wells, in referring to a loose panel in the closet asked the appellant about it, whereupon Henry stated it was there before he moved in.
>
> "After the arrest the appellant, referring to Helen Thomas, told Wells, 'Billy, you don't have to take her down; she doesn't know anything about the stuff.' Wells replied, 'Well then, is it your stuff?' Thereupon, Henry 'just smiled and didn't reply.'
>
> "At the Police Station, appellant stated, 'I am responsible for everything that was found on the premises' and further stated that he had lived at 803 Hausten Street for about two (2) months prior to the arrest."

After conferences between court and counsel over requested instructions and the settlement thereof (R. 437-438), the court gave its jury charge. R. 439-463. No comment on the evidence was therein made by the court. After deliberating some time the jury requested that instructions on the subject of possession be repeated and the court complied with the request. R. 467-473. Later on, the jury requested a transcript of all the instruction given. R. 473-477. The court refused this request and stated to the jury, "As I indicated, or intimated, last evening, in lieu thereof I am going to go over the instructions this morning in my own language and words. I am also going to review some of the evidence for you". R. 478. Thereupon the court gave a new and superseding jury charge (R. 477-502) accompanied and emphasized by writings and diagrams made on a blackboard by the trial judge (R. 481). It was virtually another argument for the prosecution. It overstated the case of the government; it understated and belittled the case of the defendant.

In reviewing the testimony upon which the government relied, the court said narcotic agent Wells testified he searched "defendant's bedroom" at 803 Hausten Street. R. 487. According to the record, defendant's counsel objected to this conclusion of the witness, and a ruling sustaining the objection was tacit. R. 372. The court said Wells testified he arrested defendant as "they were going downstairs" in response to a call by a police officer that he had found something. R. 487. According to the record, Wells testified he arrested de-

fendant in an upstairs bedroom 30 or 40 minutes after the search warrant was served. R. 384. The record has it that the search warrant was served after 12:38 p.m. (R. 370-371), and that the officer mentioned made his discovery at 11:55 p.m. (R. 270). The court also said Wells testified that when he asked defendant if certain "stuff" was his, the defendant "shrugged his shoulders and smiled". R. 489. The court supplied the shrugging for the record does not contain it. R. 383. As to count one the court said, "There is no dispute in this case that the drugs in evidence are cocaine and heroin". R. 402. The matter was disputed. Defendant was indicted respecting a large quantity of narcotics. Only a small quantity was proved to be narcotics.

Comments of the court upon the defendant's case are quoted, R. 492-493:

> "The defendant plead not guilty, and to date, as I understand the evidence, he has not, on his side of the case, admitted or explained, during the course of the trial, any possession of these drugs. The only evidence offered by the defense was that these premises at 803 Hausten Street, according to the records of the local Rent Control office of the City and County of Honolulu were premises owned by some landlord at the time in question by the name of Olson, I believe, and rented by that landlord to this Mrs. Thomas that we have heard so much about. From that it would appear to my mind—but what inference you gentlemen are to draw from it is for you, and you alone to determine—it would appear to me, I say, that the defendant by that evidence was the record tenant,

it would seem to me that there was a basis made for a possible inference which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises. This is the same Mrs. Thomas that was mentioned throughout the trial as having also been arrested at the time of the raid, the same Mrs. Thomas that the defendant, according to the testimony, advised not to talk, the same Mrs. Thomas that the evidence may show the defendant begged Mr. Wells not to re ain in custody and take to the station."

The court did not mention in its comments that one of the witnesses for the government testified that defendant's residence was at 408 Keamianu Street, R. 295-296; he did not mention that narcotics were found in the cushions of a sofa or couch on which Mrs. Thomas had been sitting; and he did not mention evidence discrediting the testimony of a police officer as to statements made by defendant at the police station. R. 414-418.

QUESTIONS PRESENTED.

1. Were the confessions and incriminatory statements made by defendant while under illegal detention admissible in evidence against him?

2. Did the trial judge exceed the bounds of proper comment on the evidence in his jury charge?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. **THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN UPSHAW v. UNITED STATES, 335 U.S. 410, ON A QUESTION OF PARAMOUNT IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE.**

The decision of this court in the *Upshaw* case is plain authority for the rule that confessions and incriminatory statements made by a defendant while under illegal detention are not admissible against him. That rule is applicable here. Petitioner was kept under detention and subjected to interrogation for four hours after his arrest and until a time when it was too late to take him before a Commissioner. He sought vainly to have excluded from evidence confessions and incriminatory statements made during that time. R. 426-427. On the authority of the *Upshaw* case his conviction on such evidence should not be allowed to stand.

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2. **THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN QUERCIA v. UNITED STATES, 289 U.S. 466, ON A QUESTION OF PARAMOUNT IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE.**

The decision of this court in the *Quercia* case is plain authority for the rule that in commenting on the evidence a trial judge may not assume the role of partisan or advocate and that due process of law occurs when a trial judge contravenes the rule. That rule is applicable here. Here in the jury charge in commenting on the facts the trial judge gave to the

case of the prosecution more than its maximum strength and to the case of the defendant less than its minimum strength. A fair trial and due process of law demand something better, and petitioner did not receive it. On the authority of the *Quercia* case his conviction should not be allowed to stand.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit and that the judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
March 7, 1951.

Respectfully submitted,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	10
Conclusion	12

CITATIONS

Cases:

Allis v. *United States*, 155 U. S. 117	11, 12
McNabb v. *United States*, 318 U. S. 332	2, 10
Minkoff et al. v. *United States*, No. 542, certiorari denied Mar. 26, 1951	10
Quercia v. *United States*, 289 U. S. 466	11
United States v. *Goldstein*, 120 F. 2d 485, affirmed, 316 U. S. 114	11
United States v. *Mitchell*, 322 U. S. 65	11
United States v. *Murdock*, 290 U. S. 389	11
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	12
Upshaw v. *United States*, 335 U. S. 410	10

Statutes and Rules:

26 U.S.C. 2553(a)	2
26 U.S.C. 2593	2
Federal Rules of Criminal Procedure, Rule 5 (a)	10

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 604

WINSTON CHURCHILL HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 540-546) is reported at 186 F. 2d 521.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1951 (R. 546-547), and a petition for rehearing was denied on February 14, 1951 (R. 547). The petition for a writ of certiorari was filed on March 12, 1951. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether voluntary statements petitioner made to the arresting officers before and after his arrest were inadmissible under the rule of *McNabb* v. *United States*, 318 U.S. 332.

2. Whether the trial court's comments on the evidence, in its supplemental charge to the jury, were improper.

STATEMENT

In a two-count indictment (R. 2-3) filed September 15, 1949 (R. 3), in the United States District Court for the District of Hawaii, petitioner was charged with unlawfully purchasing heroin and cocaine, in violation of 26 U.S.C. 2553(a) (count 1), and with acquiring marihuana without having paid the transfer tax, in violation of 26 U.S.C. 2593 (count 2). Following a trial by jury, petitioner was found guilty on both counts (R. 26-27), and he was sentenced to four years' imprisonment and a $1,000 fine on count 1 and to two years' imprisonment and a $1,000 fine on count 2, the imprisonment sentences to run consecutively (R. 34-35). On appeal to the Court of Appeals for the Ninth Circuit, the conviction was affirmed (R. 546-547).

The evidence adduced by the Government is uncontroverted and may be summarized as follows:

At about 8:30 a.m. on July 16, 1949, armed with a warrant to search a certain building located at 803 Hausten Street, Honolulu, T.H. (R. 65-68), which was leased to one Helen Thomas by the owner, Mrs. Olson (R. 433), William K. Wells, Acting District Supervisor of the Bureau of Narcotics, United States Treasury Department (R. 368), accompanied by several members of the Honolulu Police Department, entered an adjacent building to observe the premises described in the warrant (R. 257-259, 368-370). Several hours later, at approximately 12:30, when Wells saw petitioner walk from the direction of the 803 Hausten Street building toward a parked automobile (R. 261), Wells and the other officers approached petitioner and Wells said, "Henry, I got a search warrant to search your premises." Petitioner said "O.K." and accompanied the officers to the house (R. 370).

When they reached the door, petitioner called to someone inside to open it and then asked the officers to enter (R. 262, 371). Inside the house,[1] Wells served the warrant on petitioner and asked him if he wanted it read to him (R. 262, 371); petitioner replied, "No, Billy" (R. 371). During the search, the officers discovered an Ovaltine bottle containing 915 heroin capsules under a flagstone path at the rear of the house (R. 264, 267-269, 297, 394) and a bottle containing cocaine under a pillow

[1] Helen Thomas, Charles Montgomery, Dolores Allen and two little girls were in the house when the officers entered (R. 275, 371-372, 383).

of a couch in the patio (R. 298, 395). When Wells was called and looked at the Ovaltine bottle, he said, "This is about 200 grains, don't you think so, Henry?" to which petitioner replied, "More than that." When Wells tasted the contents, petitioner said, "Man, that is dynamite. Billy, you know better than that." (R. 300-301). As the search continued, petitioner was placed under arrest, the time being fixed by Wells at between 1:00 and 1:20 p.m. (R. 384). A bag containing 29 marihuana cigarettes in a box was found in the eaves in the back of the house (R. 321-323, 395-398) and six more marihuana cigarettes were found under the sofa cushions in the living room (R. 327, 398-399). When Wells reached the kitchen, he asked petitioner if he had the key to a closet underneath the stairway. At first, petitioner denied having the key, but at Wells' insistence that he had to search the closet, petitioner told Mrs. Thomas to get the key, which she did. (R. 375-376.) In searching the closet, Wells found a loose panel; he said to petitioner, "Shorty, this is a good plant, but it's empty." Henry replied that "it was there before he moved in." (R. 376.) Returning to the kitchen, Wells said, "Shorty, you have a nice place here. How long have you been living here?," and Henry replied, "Oh, not very long." (R. 376.) Petitioner then said to Wells, "Billy, you don't have to take her [Helen Thomas] down; she doesn't know anything about this stuff." To Wells' remark,

"Well, then, is it your stuff?," petitioner "just smiled and didn't reply." (R. 383.)

After the search was completed, petitioner was taken to the police station, arriving there at about 4:00 p.m. (R. 303). At the station, about 4:45 p.m., he told the police that he was responsible for "everything that was found on the premises" and said that he had been living at the Hausten St. address for about two months prior to the arrest (R. 412-413).

Although there was no objection at the time it was offered to the testimony as to petitioner's statements to the officers during the search and at the station, he moved at the close of the Government's case to strike this testimony on the ground that his arrest was illegal and anything said by him was presumed to have been said under duress (R. 426). The motion was denied (R. 431).

The jury retired to deliberate upon their verdict at 4:40 p.m., but returned at 5:05 p.m. to ask for further instructions as to what constitutes possession. After receiving such instructions, the jury resumed their deliberations, but returned again at 10:50 p.m. to ask that they be permitted to retire for the night and that upon resumption of their deliberations the following morning they be furnished a transcript of the court's instructions. The judge granted the first request, but stated that it would not be possible to have the instructions

transcribed overnight and that he would go over them the following morning. (R. 467-475.)

The next morning, the judge repeated some of the general instructions and explained again the charges of the two counts of the indictment and the statutes under which they were laid (R. 477-485). Turning to the evidence as to possession of the drugs found in the search, which he characterized as "the pivotal fact" in the case (R. 485), but emphasizing several times that it was the jury's duty to recollect and evaluate the evidence, the judge pointed out the following testimony upon which the Government relied: Wells' testimony as to (1) the circumstances of the service of the search warrant upon petitioner and the officers' entrance into the building, (2) petitioner's statements to Wells concerning the contents of the Ovaltine bottle and the loose panel in the closet, (3) petitioner's statement that Mrs. Thomas should not be taken into custody because she knew nothing about the "stuff" and his reaction to Wells' question whether it was his,[2] and (4) his reply to Wells' question as to how long he had been living at the house (R. 486-489). After mentioning officer Kinney's testimony that at the police station petitioner admitted his responsibility for everything found in the search (R. 489-490), the judge turned to the "other side of the picture" and told the jury that petitioner did not have

[2] The trial judge said (R. 489): "Wells testified at that point that the defendant shrugged his shoulders and smiled." Compare R. 383.

to testify, but instead could rely on other witnesses to explain the possession the Government claimed it had established or rest upon the proposition that possession had not been established beyond a reasonable doubt. The judge then said that as he understood the evidence, petitioner had not "admitted or explained, during the course of this trial, any possession of these drugs"; that the only evidence offered by the defense was that, according to records of the Rent Control office, the premises at 803 Hausten Street were owned by a Mrs. Olson and rented to Mrs. Thomas, whom neither side had produced as a witness; and that by such evidence "there was a basis made for a possible inference, which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises." (R. 491-493.)

At the conclusion of his summary of the evidence, the judge reiterated (R. 495):

> As to what the evidence is, I repeat, you, and you alone, are the judges of it, how much weight and significance you are to give to it. You are the sole judges of the facts and of the credibility of the witnesses. You are to disregard anything you might think I think. You are to arrive at your own independent judgment, and each and every one of you, in order to find the defendant guilty, must be satisfied beyond a reasonable doubt, as the case stands,

that the defendant did have possession of these narcotics. If you are not so satisfied, you must acquit.

In the absence of the jury, petitioner excepted to the judge's remarks on the evidence on the general ground that he did not advert to "certain matters which were brought out on cross-examination" of government witnesses. He also excepted to the judge's failure to refer to officer Case's testimony that he had watched petitioner's residence on Keanianu St. and to his reference to the fact that neither side had called Mrs. Thomas. (R. 496-497.) After some discussion of the exceptions, during which government counsel pointed out that the judge had not mentioned one of the incriminating statements petitioner made to Wells, the judge said he had told the jury that he "was not purporting to tell them everything, that they are the ones to remember what the evidence was, not me" (R. 497-499). To the judge's suggestion that perhaps petitioner's counsel would rather not have the judge comment on Case's testimony since he would then have to instruct the jury that as a matter of law a man can have more than one residence, counsel replied, "It is entirely up to the Court" (R. 500). The judge did agree, however, to clarify his reference to the fact that neither side had called Mrs. Thomas (R. 499), and upon the jury's return he gave them an appropriate instruction to which no exception was taken (R. 501). He con-

cluded his instructions with the following admonition (R. 501-502):

> There has also been some intimation that perhaps I didn't make as clear to you as I should have, and which I will now try to do, that irrespective of what I have done by way of reviewing the evidence, you gentlemen know full well what all of the evidence is and you are to base your verdict on your assessment and evaluation and measurement of all of the evidence, whether it be given on direct or cross-examination, and to disregard my brief review of it. I may have omitted or emphasized certain things. If so, those omissions or particular emphases are to be disregarded as of no significance or importance, and on all of the evidence by all of the witnesses you are to base your determination, but, as I have told you ninety-nine times, but will tell you now for the last time, you, and you alone, are the sole and exclusive judges of the facts to be drawn from the evidence and from the credibility of the witnesses.

There were no further exceptions to the instructions (see R. 502).[3]

---

[3] Later in the day, at the jury's request, they were taken to view the premises at 807 and 803A Hausten St. and following this, also at their request, the testimony of three witnesses was read to them. The jury then retired for the night at 7:10 p.m. They resumed their deliberations at 10:00 o'clock the following morning and brought in their verdict at approximately 3:00 p.m. (R. 502-511.)

ARGUMENT

1. Petitioner contends that the admission in evidence of the statements he made to the officers during the search and at the police station (see pp. 3-5, *supra*) was in violation of the rule of *McNabb* v. *United States*, 318 U.S. 332, and *Upshaw* v. *United States*, 335 U.S. 410, because he was "kept under detention and subjected to interrogation for four hours after his arrest and until a time when it was too late to take him before a Commissioner" (Pet. 9). There was no such objection at the trial and no foundation laid for invoking the *McNabb rule* (see p. 5, *supra*). For aught that appears in the record (the time of arraignment not appearing), petitioner was arraigned "without unnecessary delay," as required by Rule 5(a), F. R. Crim. P.

Here, as in *Minkoff et al.* v. *United States*, No. 542, this Term, certiorari denied, March 26, 1951 (see our brief in opposition, pp. 12-13), the contention based on the *McNabb* rule is an afterthought (see R. 544) and frivolous. For not only is it clear from the Statement (*supra*, pp. 3-5) that petitioner's statements were casually and voluntarily made, rather than as a result of any interrogation by the officers, but, as the court below pointed out (R. 545), most of them were made during the search before he was taken to the police station. Obviously there was no unnecessary delay in arraignment up to that time. And his state-

ments at the police station, 45 minutes after his arrival there (see p. 5, *supra*), were clearly admissible under *United States* v. *Mitchell*, 322 U.S. 65, even if it be assumed that thereafter there was unnecessary delay in arraigning him.

2. Petitioner complains (Pet. 9-10) that the trial court's supplemental charge to the jury, a portion of which he quotes (Pet. 7-8), exceeded the bounds of fair comment on the evidence and deprived him of a fair trial. We submit that the charge when read in its entirety is eminently fair. It is well settled that a trial court need not recapitulate all the items of evidence (*Allis* v. *United States*, 155 U.S. 117, 124), and that the judge may comment on the evidence so long as the factual issues in the case are fairly submitted to the jury for its determination. See, in addition to *Quercia* v. *United States*, 289 U.S. 466, 469, upon which petitioner relies (Pet. 9-10); *United States* v. *Murdock*, 290 U.S. 389, 394; *United States* v. *Goldstein*, 120 F. 2d 485, 491 (C.A. 2), affirmed 316 U.S. 114. This was certainly done in the instant case. The judge not only repeatedly emphasized (R. 486, 487, 489, 490, 491, 492, 493, 495, 501-502) that it was the duty of the jury alone to evaluate the evidence, but his review and comment on the evidence adduced by the Government was balanced by a similar review of the evidence offered by petitioner (see pp. 6-7, *supra*). In addition, he advised the jury to disregard any opinions he might have

expressed (R. 502). Finally, after the charge was given, the trial court met petitioner's objections to it, which included the contention he is now making, by an additional charge (*supra*, pp. 7-8), in which petitioner apparently acquiesced. Cf. *Allis* v. *United States, supra,* at 122; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 238-239.

CONCLUSION

The decision below is correct and no conflict of decisions or question warranting further review by this Court is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1951.

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